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IN THE

Supreme Court of the United States

OCTOBER TERM 1949.

No. 261

FRANK M. COBB, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Sixth Circuit entered in the above entitled cause on April 4, 1949 (R. 52), affirming a decision of the Tax Court of the United States denying to the Petitioner the right to deduct, under Section 23(a)(2), Internal Revenue Code, attorney's fees paid in connection with a dispute arising out of a gift tax liability.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 4, 1949.

The time for filing a petition for a writ of certiorari was extended to August 15, 1949 by order of a Justice of this Court (28 U. S. C. Sec. 350) (R. 59).

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1) and Sec. 240, amended, of the Judicial Code (28 U. S. Code, Sec. 347(a)).

OPINIONS BELOW.

The Findings of Fact and Opinion of the Tax Court of the United States are reported at 10 T. C. 380 (R. 34-43).

The Opinion of the Court of Appeals is reported at 173 F. 2d 711.

QUESTION PRESENTED.

Are expenses of litigation arising from a contest of gift tax liability, on gifts of income producing property, incurred in the "management" of such property within the meaning of Sec. 23(a)(2) Internal Revenue Code? Under Sec. 23(a)(2) of the Internal Revenue Code, individuals may deduct from gross income those non-trade or non-business expenses incurred in the "management, conservation, or maintenance of property held for the production of income."

The Tax Court and the Court of Appeals answered the question "No." Petitioner contends the answer should be "Yes."

STATUTE INVOLVED.

Sec. 23 of Internal Revenue Code (26 U. S. C.) as amended by Sec. 121(a), Revenue Act of 1942, c. 619, 56 Stat. 798 (applicable to taxable years beginning after December 31, 1938), reads in part as follows:

"Sec. 23. *Deductions From Gross Income.*

"In computing net income there shall be allowed as deductions:

"(a) Expenses.—

* * * *

"(2) Non-Trade or Non-Business Expenses.—

"In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income."

STATEMENT.

The facts in this case are partly stipulated (R. 25, 26, 27), part appear in the Findings of Fact of the Tax Court, and the remainder appear in the undisputed testimony and exhibits (R. 15 to 25, inclusive). The Record, therefore, presents a clear-cut issue of law whether, upon such facts, Petitioner is entitled to the relief prayed for.

The taxable year involved is 1944. In that year Petitioner paid his attorneys $2,260.00 as fees for their advice and services in connection with the gift tax dispute with the Commissioner of Internal Revenue which occurred in the years 1942 and 1943 (Tax Court Findings of Fact, R. 36). Petitioner resides in Cleveland, Ohio, and filed his income tax return for 1944 with the Collector of the Eighteenth District of Ohio at Cleveland (R. 25, 35). Petitioner's books were kept and his 1944 return was made on a cash receipts and disbursements basis (R. 36).

Prior to December 1, 1941, Petitioner owned an undivided one-half interest in a certain parcel of real estate located at 234-236 Euclid Avenue, Cleveland, Ohio. On or about December 1, 1941, Petitioner delivered to each of his four daughters a deed of gift, transferring to each of them an undivided 1/12th interest in fee simple of such real estate (R. 16, 26, 35). The purpose of Petitioner in making said gifts was to aid his daughters and their families financially and to reduce his income taxes (R. 36).

In 1940 Petitioner's income from said property was $20,000.00, which in 1941 increased to $33,500.00 (R. 16). One-half interest in said property had an approximate value of $300,000.00, and in addition thereto Petitioner owned other income-producing real estate and securities of a value in excess of $200,000.00 (R. 15).

Petitioner filed a gift tax return for the year 1941 and paid therewith a gift tax of $18,943.65 (R. 26, 35). Before making such return Petitioner consulted John D. Fackler of the firm of Fackler, Dye and Hopkins, a lawyer experienced in real estate valuations, as to what value should be used in the return for each 1/12th interest (R. 17). These attorneys were at that time litigating an estate tax proceedings involving a valuation by the Commissioner of Internal Revenue of a 1/18th interest in the same property (R. 16, 17). On July 29, 1942, the Internal Revenue Agent in charge in Cleveland mailed Petitioner a letter proposing an adjustment of said gift tax liability, which resulted in a gift tax deficiency of $13,840.52 (R. 26). In this letter the valuation of each 1/12th interest in said property was increased 70 percent over the valuation returned by Petitioner (R. 17). About August 6, 1942, Petitioner consulted Fackler, Dye and Hopkins with respect to the proposed adjustment. These attorneys advised against acceptance of the same, and prepared and filed a protest on Petitioner's behalf (R. 26). On November 23, 1942, the Commissioner of Internal Revenue notified Petitioner that a determination of his gift tax liability for 1941 disclosed a deficiency of $13,840.52, upon an increase of 70 percent in the valuation of said 1/12th interests. At Petitioner's request the attorneys prepared and filed a petition for redetermination of such deficiency in the Tax Court of the United States (R. 26, 35). After Petitioner's attorneys had prepared for trial before the Tax Court, a settlement was reached, and pursuant to a stipulation of the parties, on December 14, 1943 the Tax Court found a deficiency in such gift tax in the amount of $6,000.00 (R.

35). On or about December 29, 1943, Petitioner paid such deficiency together with interest of $643.80 (R. 35). In order to pay said deficiency of $6,000.00, Petitioner sold income-producing securities at a loss (R. 36). If the original deficiency of $13,840.52 had been sustained, Petitioner would have had to sell additional income-producing property in order to pay the tax (R. 36). On January 12, 1944, Petitioner paid said attorneys $2,260.00 as fees for their advice and services in connection with said litigation, which amount was reasonable for the services rendered (R. 27).

The question here presented with respect to the taxable year 1944 arose upon an audit by the Commissioner of Internal Revenue and the assessment on September 9, 1946 of an income tax deficiency in the amount of $360.32 (R. 8, 25). Petitioner protested said deficiency, and on December 4, 1946 (R. 26), filed in the Tax Court of the United States a petition for redetermination of the deficiency and claimed a refund of $1,356.18 based upon a recomputation of the income. In computing such income, Petitioner claimed a deduction of $2,260.00 as attorney fees paid in 1944 for advice and services in contesting said Federal gift tax liability (R. 7). On April 15, 1948 the Tax Court, with three judges dissenting, sustained the Commissioner in part and fixed and determined the income tax deficiency in the sum of $203.67 (R. 44). The Tax Court approved the determination of the Commissioner in disallowing as a deductible item under Sec. 23(a)(2) the attorney fees paid by Petitioner in connection with said gift tax dispute (R. 34). On July 2, 1948, Petitioner filed in the United States Court of Appeals for the Sixth Circuit a petition to review the decision of the Tax Court (R. 44). On April 4, 1949, in Case No. 10759, the Court of Appeals affirmed the decision of the Tax Court (R. 52).

PETITIONER'S CLAIMS.

The Euclid Avenue property was income-producing property. Four 1/12ths were donated by Petitioner to his daughters, and 1/6th was retained by him (R. 15).

When Petitioner received the letter of the Agent of the Commissioner dated July 29, 1942, proposing a 70 percent increase in the value of each 1/12th interest and an increase in the gift tax from $18,943.65 to $32,784.17, he had the alternative of accepting the deficiency or in applying to the Tax Court for a redetermination of the same. After consultation with his attorneys, Petitioner directed them to take the necessary legal steps to protect and defend Petitioner and the property included in the gift.

The Federal gift tax (Secs. 1000 to 1031, Internal Revenue Code) is an excise upon the transfer of property by gift. Such tax is imposed on the exercise by the owner of his right to give away his property (*Bromley* v. *McCaughn*, 280 U. S. 124, November 25, 1929). The gift itself is the generating cause of the tax, and the gift tax liability attaches to the donor from the time of the gift (Sec. 1008, Internal Revenue Code). The law also imposes the lien on the donated property from the time the gift was made (Sec. 1009, Internal Revenue Code).

The settlement of the deficiency in the Tax Court at $6,000.00 saved Petitioner $7,840.52. It also extinguished the gift tax lien on the donated property. The decision of Petitioner to contest the deficiency was an act of "management" not only with respect to the donated property, but also with respect to the property retained by Petitioner. With respect to the latter, there was "conservation" of income producing property of the value of $7,840.52.

For the services of the attorneys in handling this dispute, Petitioner paid the sum of $2,260.00. Under the circumstances, this was "ordinary and necessary expenses" in the "management" of Petitioner's income-producing property. There is no dispute in the Record that the services of the attorneys were rendered in connection with the gift tax dispute. It is stipulated that the amount of the fees paid to them was reasonable (R. 27, 36). The

courts below denied the claimed deduction upon the erroneous view that denial was required as a matter of law (cf. *Commissioner of Internal Revenue* v. *Heininger*, 320 U. S. 467, 475).

Although upon the execution of the deed of gift the holding of the income-producing property of Petitioner reached its expiry, yet the making of the gift *per se* imposed upon Petitioner the duty of paying the gift tax. The proceedings with relation to the determination and payment of such tax required further action by Petitioner. These acts were separate and independent from the making of the gift and were the acts that directly brought about the hiring of the attorneys and the incurring of the litigation expenses here involved.

DECISIONS OF COURTS BELOW.

Both the Tax Court and the Court of Appeals disposed of this case on the ground that the giving away of property is not an act of "management" within the meaning of Sec. 23(a)(2). (Opinion of Tax Court, R. 34-43; Opinion of Court of Appeals, R. 52.)

The Court of Appeals could find no warrant under Sec. 23(a)(2) for allowing the deduction claimed by the Petitioner for the following reasons:

(1) The Treasury Regulations 111, Sec. 29.23(a)-15(b) as amended (May 14, 1946) by T. D. 5513, explicitly prohibited deduction of the gift tax expenses in this case.

(2) The only act of "management" found by the court was the act of "making the gifts." The various acts of Petitioner in discharging his duty to pay the gift tax are not mentioned in the opinion of the court. The court stated: "We are unable to adopt the impractical concept that giving away property produces income to the donor, or constitutes either management or conservation of the property."

(3) In undertaking to distinguish the case at bar from *Bingham* v. *Commissioner of Internal Revenue*, 325 U. S. 365, the court said:

> "In the *Bingham* case, the trustee was bound to the duty of managing and distributing the trust property. Here, the taxpayer made voluntary personal gifts of a part of his own property to his daughters. These gifts were not distributions which he was compelled to make. Nor were they essential to the 'management, conservation, or maintenance of property held for the production of income.' Certainly, the expense appertaining to making the gifts does not fall within the category of 'ordinary and necessary paid or incurred during the taxable year for the production or collection of income.' "

REASONS FOR GRANTING THE WRIT.

(1) The question whether attorney fees incurred in contesting a gift tax liability are deductible under Sec. 23(a)(2) is an important question of Federal law which has not been, but should be, settled by this court.

This section was enacted by Congress in 1942 for the benefit of individual taxpayer who were, under Sec. 23(a)(1), denied the right to deduct expenses incurred in the management of income-producing property (*Higgins* v. *Commissioner*, 312 U. S. 212). The only decision of this court interpreting that part of Sec. 23(a)(2) pertaining to the deduction of expenses and attorney fees incurred in the "management" of income-producing property is *Trust of Bingham* v. *Commissioner*, 325 U. S. 365 (decided June 4, 1945).[1]

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[1] Section 23(a)(2) affects nearly every individual taxpayer. The frequency with which lower courts have cited the *Bingham* decision indicates that it has not settled the interpretation of Section 23(a)(2) for the Commissioner, the taxpayers, or the lower courts. The Prentice-Hall Tax Citator shows that the part of the *Bingham* opinion dealing with Section 23(a)(2) has been cited in 32 separate cases, including citation in 7 dissenting opinions; that it has been "explained" in three United States Court of Appeals opinions and has been "distinguished" in two United States Court of Appeals opinions.

In the case at bar the question arises under an *inter vivos* gift. In view of the great number of taxable gifts being currently made by individuals, this question is of great importance and should be decided now.[2]

(2) The decision of the Court of Appeals in the case at bar is in conflict in principle with the authoritative interpretation of Sec. 23(a)(2) by this court in the *Bingham* case. The statute was fully considered by this court and principles were announced which are controlling in the case at bar. This court held that the expenses and attorney fees incurred by testamentary trustees in winding up the trust after its expiration were deductible under Sec. 23(a)(2) as expenses of "management" (Syllabus 2, pp. 373, 376). The ruling is distinctly and repeatedly made that the trust property did not cease to be "held for the production of income," even when the trust reached its "expiry" date and the trustees were engaged in distributing the same to the beneficiaries (Syllabus 3, pp. 373, 374, 375). The important principles of interpretation laid down by this court were that property "held for the production of income" does not cease to be such during the process of distribution to the new owners and that such distribution is a function of "management".

With respect to these points this court said (pp. 374, 375):

> "The Government contends that the expenses incurred in connection with the distribution of the corpus of the trust to legatees are not deductible, because they are not expenses of managing income producing property, but expenses in connection with the devolution of the property. If the suggestion is correct, it would follow that expenses incurred in distributing the income of the trust to the income beneficiaries are likewise not deductible, since the distribution of income is also a dev-

---

[2] The reports of the Commissioner of Internal Revenue show that a total of 224,252 gift tax returns were filed during the past ten years. For the fiscal year 1948, 30,603 returns were filed and $9,861,586.00 in additional gift tax assessments were made by the Commissioner. (Annual Report of Commissioner of Internal Revenue, 1948, page 39.)

> olution of trust property. But the duties of the trustees were not only to hold the property for the production of income and to collect the income, but also, in administering the trust, to distribute the income and the principal so held from time to time, and the remainder of the principal at the expiration of the trust. Performance of each of these duties is an integral part of carrying out the trust enterprise. Accordingly, as the Tax Court held, the costs of distribution here were quite as much expenses of a function of 'management' of the trust property as were expenses incurred in producing the trust income; and if 'ordinary and necessary', they were deductible."

In the case at bar Petitioner's income-producing property passed to the donees under the deed of gift, subject to the payment of the gift tax by the donor. The law imposed upon the donor the duty to pay the tax, and subjected the donated property to a lien until the tax was paid. The various steps taken by Petitioner in paying the tax and freeing the donated property from the lien were acts of "management" in the "devolution" of said property. Consequently, the attorney fee expense incurred in such proceedings constituted a deductible item under the statute.

(3) The Regulations of the Treasury Department 111, Sec. 29.23(a)-15(b), T. D. 5513, approved May 14, 1946, definitely disallow the deduction of expenses in contesting a gift tax liability. These Regulations are in conflict with the principles announced by this court in the *Bingham* case. Many people owning income-producing property are currently making taxable gifts. Such taxpayers should not be confronted with invalid regulations of the Treasury Department and erroneous decisions of the lower courts which will deter them from making gifts or in asserting their right to contest a gift tax deficiency. If such regulations and decisions are wrong, they should not be permitted to stand as a controlling declaration and interpretation of the law.

(4) The Court of Appeals denied the claimed deduction upon an erroneous view of the law. Said court ignored

the important teaching of the *Bingham* case that within the meaning of Sec. 23(a)(2), I. R. C., property does not cease to be "held", even though the period of such holding draws to its "expiry" date and such property is being distributed to its new owners. Said court further undertook to distinguish the *Bingham* case on the ground that the trustee in that case had a "duty" to perform at the "expiry" date of the testamentary trust, that is, the distribution of the trust res to the beneficiaries. They failed to understand and to give effect in the case at bar that Petitioner had a "duty" to perform with respect to the donated property, i.e., the discharge of his gift tax liability, and the resultant cancellation of the gift tax lien on the donated property.

Said court decided this case on the assumption that the only act of "management" by Petitioner was "giving away property." No heed was given to the acts of Petitioner in contesting the gift tax deficiency assessed by the Commissioner of Internal Revenue. Said court apparently failed to understand the meaning, force and effect of the Federal gift tax law, i.e., that the making of the gift, *per se*, imposed a personal obligation on the donor to pay the tax and a lien on the donated property to assure such payment. Clearly, the contesting of such deficiency was a separate and independent act of "management" from that of making the gift. Furthermore, it was the act that proximately occasioned the attorney fee expense—the deduction claimed in this case.

CONCLUSION.

This Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The prevailing (R. 34–40) and dissenting (R. 40–43) opinions in the Tax Court are reported at 10 T. C. 380. The opinion of the Court of Appeals (R. 52–58) is reported at 173 F. 2d 711.

JURISDICTION

The judgment of the Court of Appeals was entered on April 4, 1949 (R. 52). The time for filing a petition for a writ of certiorari was extended to August 15, 1949, by order of Mr. Justice Reed, dated June 23, 1949 (R. 59). The petition for a writ of certiorari was filed on August 12,

1949. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether, in computing taxpayer's income tax for 1944, he was entitled, under Section 23 (a) (2) of the Internal Revenue Code, to deduct from gross income the amount he paid in that year as attorneys' fees in connection with a dispute as to his gift tax liability between himself and the Commissioner of Internal Revenue.

STATUTE AND REGULATIONS INVOLVED

These are set out in the Appendix, *infra*, pp. 10–14.

STATEMENT

The Tax Court found the following facts (R. 35–36):

The taxpayer resides in Cleveland, Ohio, and filed his income tax return for 1944 on January 15, 1945, with the Collector of the Eighteenth District of Ohio, at Cleveland. During 1944, taxpayer was employed as general counsel by The Cleveland Electric Illuminating Company and received $10,416 as compensation for his services rendered in that year. In addition to his salary, the taxpayer received, in 1944, net income of $16,380.32 from real estate rentals and $10,790.25 from dividends and interest (R. 35).

The taxpayer's books were kept and his 1944 return was made on a cash receipts and disbursements basis (R. 36).

Prior to December 1, 1941, the taxpayer owned an undivided one-half interest in a certain parcel of real estate located at 234–36 Euclid Avenue, Cleveland, Ohio. On or about December 1, 1941, taxpayer delivered to each of his four daughters a deed of gift transferring to each of them an undivided one-twelfth interest in fee simple of such real estate (R. 35).

The taxpayer filed a gift tax return for 1941 in which he listed such gifts to his daughters and other gifts, and paid a gift tax of $18,943.65 with the return (R. 35).

Thereafter, on July 29, 1942, the Internal Revenue Agent in Charge in Cleveland sent a letter to taxpayer proposing an adjustment of his 1941 gift tax liability which would result in a gift tax deficiency of $13,840.52 (R. 35).

On or about August 6, 1942, taxpayer employed reputable attorneys to advise him as to the merits of the proposed adjustment and to protect his interests in the matter. The attorneys prepared and filed on taxpayer's behalf a protest against the proposed adjustment. By an appropriate notice, dated November 23, 1942, the Commissioner of Internal Revenue notified taxpayer that a determination of his gift tax liability for 1941 disclosed a deficiency of $13,840.52. At taxpayer's request, his attorneys prepared and filed in the Tax Court of the United States a petition for redetermination of such deficiency. After taxpayer's attorneys had prepared for trial before the

Tax Court, a settlement was reached and on December 14, 1943, the Tax Court, pursuant to stipulation of the parties, found a deficiency in such gift tax in the amount of $6,000. On or about December 29, 1943, taxpayer paid such deficiency together with interest of $643.80 (R. 35).

Taxpayer's income in 1940 was more than $51,000. In 1940, the Euclid Avenue property yielded rent to taxpayer of approximately $20,000. In 1941, the property was occupied for the whole year and taxpayer's share of the rental was $33,500. In 1940, taxpayer was constructing a building on other property he owned which was leased subsequently to Marshall Drug Company. The indications were that his annual income would increase considerably over the amount received in 1940 (R. 36).

In order to aid his daughters and their families financially and to reduce his income taxes, taxpayer made the above-mentioned gifts to his daughters (R. 36).

Prior to making the gifts he consulted with one of his attorneys especially experienced in valuation matters with respect to the value of the four one-twelfth interests in the Euclid Avenue property to be reported in his gift tax return (R. 36).

In order to pay the 1941 gift tax deficiency of $6,000, the taxpayer sold at a loss income-producing securities. If taxpayer had been required to pay the original deficiency claimed, it would have

been necessary for him to sell additional income-producing securities (R. 36).

On January 12, 1944, taxpayer paid his attorneys the sum of $2,260 as fees for their advice and services as attorneys in connection with such gift tax dispute, which amount was reasonable for the services rendered (R. 36).

The taxpayer did not deduct the $2,260 in his income tax return for 1944, but later claimed the right to deduct it (R. 3, 34). The Commissioner disallowed such deduction (R. 37) and the Tax Court upheld him (R. 40), three judges dissenting (R. 43). The Court of Appeals affirmed (R. 58).

ARGUMENT

What the taxpayer here seeks to accomplish is not only the reversal of the considered judgments of the Tax Court and of the Court of Appeals for the Sixth Circuit, but, also, the invalidation of a Treasury Regulation which is concededly in the face of the taxpayer's claim. (Pet. 10.) But it is settled that the administrative judgment embodied in a Treasury Regulation "will not be disturbed except for weighty reasons" (*Brewster* v. *Gage*, 280 U. S. 327, 336), and there are none such for adopting "the impracticable concept that giving away property produces income to the donor, or constitutes either management or conservation of the property." (R. 58.)

When the Treasury provided, in its Regulation 111, Section 29.23 (a)–15, as amended, Appendix, *infra*, p. 14, that

> expenses paid or incurred by an individual in the determination of gift tax liability * * * are not deductible, even though property held by him for the production of income must be sold to satisfy an assessment for such tax liability * * *.

it did so in the wake of this Court's decision in *Trust of Bingham* v. *Commissioner*, 325 U. S. 365. See T. D. 5513, 1946–1 Cum. Bull. 61, 62. The taxpayer now contends, however, that instead of following the principles announced in the *Bingham* case, the Treasury has rejected those principles. That view is, we think, erroneous.

It is not now contended that the expenses here involved were paid or incurred "for the production or collection of income." Reliance is placed, rather, on this Court's construction of the further provisions of Section 23 (a) (2) allowing the deduction of expenses paid or incurred "for the management, conservation, or maintenance of property held for the production of income." Appendix, *infra*, p. 10. This Court, in *Bingham*, held that "litigation expenses when they are directly connected with or proximately result from the enterprise—the management of property held for production of income" (325 U. S. at 376) may be deducted under Section 23 (a) (2). But there is no such direct connection between the expenses of resisting gift taxes and the management of the taxpayer's income producing property; nor are the expenses the proximate

result of that management. That is because the making of gifts such as were made here is in no true sense an act of management. The property which was the subject matter of the gift in 1941 had been deeded away at the time the expenses were incurred in 1944, and the taxpayer cannot be said to have been engaged in the enterprise of managing property which he had already disposed of by gift. The question in these cases being one of proximity and degree, and the Treasury Regulation having drawn a reasonable line, there is no warrant for the deduction here sought.

Expenses attendant upon the distribution to beneficiaries of trust principal and income were held deductible in the *Bingham* case only because they were "expenses of a function of 'management' of the trust property". 325 U. S. at 375. They were such only because "the duties of the trustees" included a fiduciary obligation "to distribute the income and the principal so held from time to time, and the remainder of the principal at the expiration of the trust. Performance of each of these duties [was] an integral part of carrying out the trust enterprise." *Ibid.* But, here, the taxpayer was under no obligation whatever to make gifts to his daughters. The act of donation was not an act of "management, conservation, or maintenance of property held for the production of income". Section 23 (a) (2); see R. 57. Hence, the taxpayer's reliance on the *Bingham* decision is misplaced.

If, as the taxpayer states, "the contesting" of the gift tax deficiency "was a separate and independent act of 'management' from that of making the gift" (Pet. 11), the only income producing property being "managed" must have been not the property he gave but that which he retained and would have used to pay the greater deficiency than that finally determined. And the relationship between the expenses and the retained property is not such as to satisfy the test of "proximate result" announced in the *Bingham* case. In *Bingham,* this court ruled that the "Tax Court could find as a matter of fact * * * that the expenses of contesting the income taxes were a proximate result of the holding of the property for income." 325 U. S. at 376. But here, the expenses were not at all attendant upon the production of income; they were, on the contrary, directly connected with the profitless separation from the taxpayer of some of his property. The expense of resisting the Commissioner's claim had the object, in the taxpayer's words, of cancelling "the gift tax lien on the donated property." Pet. 11. Taxpayer cannot resist liens on donated property and then seek to attribute the cost of resistance to retained property.[1] The expenses here involved were

[1] Whether expenses connected with resistance to a lien on retained property would be deductible would depend, of course, on the nature and origin of the liability giving rise to the lien. Cf. R. 38–39.

"personal" or "family expenses" expressly made non-deductible by Section 24 (a) (1). Appendix, *infra*, p. 11.

CONCLUSION

The decision of the court below is required by the Treasury Regulation and it is correct. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1949.

APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [as amended by Sec. 121 (a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses.*—

(1) *Trade or business expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

* * * * *

(2) *Non-trade or non-business expenses.*—In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.

* * * * *

(26 U. S. C. 1946 ed., Sec. 23.)

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) *General Rule.*—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses; * * *;

* * * * *

(26 U. S. C. 1946 ed., Sec. 24.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.23 (a)–15. *Nontrade or Nonbusiness Expenses.*

(a) *In general.*—Subject to the qualifications and limitations in chapter 1 and particularly in section 24, an expense may be deducted under section 23 (a) (2) only upon the condition that:

(1) it has been paid or incurred by the taxpayer during the taxable year (i) for the production or collection of income which, if and when realized, will be required to be included in income for Federal income tax purposes, or (ii) for the management, conservation, or maintenance of property held for the production of such income; and

(2) it is an ordinary and necessary expense for either or both of the purposes stated in (1) above.

The term "income" for the purpose of section 23 (a) (2) comprehends not merely income of the taxable year but also income which the taxpayer has realized in a prior taxable year or may realize in subsequent taxable years; and is not confined to recurring income but applies as well to gains from the disposition of property. For example, if defaulted bonds, the interest from

which if received would be includible in income, are purchased with the expectation of realizing capital gain on their resale, even though no current yield thereon is anticipated, ordinary and necessary expenses thereafter incurred in connection therewith are deductible. Similarly, ordinary and necessary expenses incurred in the management, conservation or maintenance of a building devoted to rental purposes are deductible notwithstanding that there is actually no income therefrom in the taxable year, and regardless of the manner in which or the purpose for which the property in question was acquired. Expenses incurred in managing, conserving, or maintaining property held for investment may be deductible under this provision even though the property is not currently productive and there is no likelihood that the property will be sold at a profit or will otherwise be productive of income and even though the property is held merely to minimize a loss with respect thereto. The expenses, however, of carrying on transactions, which do not constitute a trade or business of the taxpayer and are not carried on for the production or collection of income or for the management, conservation, or maintenance of property held for the production of income, but which are carried on primarily as a sport, hobby, or recreation are not allowable as nontrade or nonbusiness expenses.

Expenses, to be deductible under section 23 (a) (2), must be "ordinary and necessary," which presupposes that they must be reasonable in amount and must bear a reasonable and proximate relation to the production or collection of taxable income or to the management, conservation, or main-

tenance of property held for the production of income.

(*b*) [as amended by T. D. 5513, 1946–1 Cum. Bull. 61, 62] Except for the requirement of being incurred in connection with a trade or business, a deduction under this section is subject to all the restrictions and limitations that apply in the case of the deduction under section 23 (a) (1) (A) of an expense paid or incurred in carrying on any trade or business. This includes restrictions and limitations contained in section 24. * * * Nor does section 23 (a) (2) allow any expenses which are disallowed by any of the provisions of chapter 1.

Capital expenditures, and expenses of carrying on transactions which do not constitute a trade or business of the taxpayer and are not carried on for the production or collection of income or for the management, conservation, or maintenance of property held for the production of income, but which are carried on primarily as a sport, hobby, or recreation are not allowable as nontrade or nonbusiness expenses. The question whether or not a transaction is carried on primarily for the production of income or for the management, conservation, or maintenance of property held for the production or collection of income, rather than primarily as a sport, hobby, or recreation, is not to be determined solely from the intention of the taxpayer but rather from all the circumstances of the case, including the record of prior gain or loss of the taxpayer in the activity, the relation between the type of activity and the principal occupation of the taxpayer, and the uses to which the property or what it produces is put by the taxpayer.

* * * * *

* * * Expenses paid or incurred by an individual in the determination of liability for taxes upon his income are deductible. If property is held by an individual for the production of income, amounts expended in determining a property tax imposed with respect to such property during the period when so held are deductible. Expenses paid or incurred by an individual in determining or contesting any liability asserted against him do not become deductible, however, by reason of the fact that property held by him for the production of income may be required to be used or sold for the purpose of satisfying such liability. Thus, expenses paid or incurred by an individual in the determination of gift tax liability, except to the extent that such expenses are allocable to interest on a refund of gift taxes, are not deductible, even though property held by him for the production of income must be sold to satisfy an assessment for such tax liability or even though, in the event of a claim for refund, the amount received will be held by him for the production of income.

* * * * *

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 261.

FRANK M. COBB, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

REPLY BRIEF FOR PETITIONER.

ROBERT ASH,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY BRIEF FOR PETITIONER.

The Government concedes that the question presented in this case is an important one of general law.

The Government's opposition to granting the writ is based upon its contentions that a Treasury Regulation should not be disturbed and that the decision of the Court of Appeals is correct. (Respondent's Brief, 9) The Government's brief also states, "There is no conflict of decisions."

The conflict of decisions arises not as between decisions of different Courts of Appeals, but as between the decision

in this case and the controlling decision of this Court in *Trust Under the Will of Bingham, et al.* v. *Commissioner,* 325 U.S. 365. (Decided June 4, 1945.) That there is confusion in the lower Courts is shown in the recent decision in *Lykes* v. *United States,* 84 F. Supp. 537 (June 3, 1949). In that case the District Court for the Southern District of Florida refused to follow the opinion of the Court of Appeals for the Sixth Circuit in the instant case as a proper interpretation of this Court's opinion in the *Bingham* case. The District Court held that attorney fees paid by the taxpayer in contesting a gift tax deficiency are deductible for income tax purposes. The District Court's opinion is printed in the Appendix to this brief, pp.——.

This Court, in the *Bingham* case, made it clear that expenses of management to come within the purview of Section 23(a)(2) need not relate to the production or collection of income. This Court said:

> "Nor is there merit in the court's conclusion that the expenses were not deductible because they were not for the production of income. Section 23(a)(2) provides for two classes of deductions, expenses 'for the production . . . of income' and expenses of 'management, conservation, or maintenance of property held for the production of income.' To read this section as requiring that expenses be paid for the production of income in order to be deductible, is to make unnecessary and to read out of the section the provision for the deduction of expenses of management of property held for the production of income."

It follows that all of the litigation expenses here in question are deductible if they are expenses of "management" or "conservation" of property, whether their expenditure did or did not result in the production of income. Notwithstanding this important and definite teaching of the *Bingham* case, the Government makes this statement:

> ". . . But here, the expenses were not at all attendant upon the production of income; they were, on the contrary, directly connected with the *profitless* separation

> from the taxpayer of some of his property." (Brief for Respondent, 8) (Italics supplied)

The Government also completely loses sight of the fact that the transactions in the *Bingham* case pertained to the administration of a testamentary *gift*. The question was whether certain expenses were allowable deductions, although the same did not result in the production of income but pertained only to acts of "management" in connection with the administration of the trust estate and its distribution to the remaindermen.

The parallel of that situation with the one in this case is striking. The gift *inter vivos* does not require a long period of administration, only the completion of the gift by the satisfaction and discharge of the gift tax liability. The law imposed upon the donor the primary and personal duty to pay the tax. Upon the proposed assessment of a deficiency in such tax by the Commissioner, petitioner employed attorneys to contest it. This was an act of "management" in the discharge of petitioner's duty to pay the tax. The proximate and direct relationship between the making of the gift and the contesting of the tax on the one hand, and the incurring of attorney fees to protect the interests of petitioner, is self-evident. In spite of this, the Government states:

> "But there is no such direct connection between the expenses of resisting gift taxes and the management of the taxpayer's income producing property; nor are the expenses the proximate result of that management." (Respondent's Brief, 6)

No result could be more direct.

Respondent's statement that the deductible expenses "were incurred in 1944" (Brief, 7) is misleading. The facts are that the gift was made in December 1941, and prior to March 15, 1942 the gift tax return was filed and the gift tax was paid. In July 1942 the Government proposed an increase in the tax. Thereupon, taxpayer em-

ployed the attorneys to protest the proposed tax, and when the deficiency was determined in November 1942, the attorneys were directed to file a case in the Tax Court for a redetermination of the deficiency. In December 1943 the Tax Court case was settled and the deficiency was paid. On January 12, 1944 the taxpayer paid his attorneys $2,260.00 as fees for all of their services in connection with the gift tax dispute (R. 18, Stipulation of Facts R. 27, Finding of Facts by Tax Court R. 36). It appears, therefore, that the litigation expenses were incurred in the years 1942 and 1943, and *payment* for the same was made in 1944.

Another important teaching of the *Bingham* case is that within the meaning of Section 23(a)(2) property does not cease to be "held" even though the period of such holding draws to its "expiry" date and such property is being distributed to its new owners. The costs of such distribution are expenses of a function of "management" quite as much as were expenses incurred in producing the income (Bingham, 366, 374, 375). In the case at bar execution and delivery of the deed to the donees in and of itself imposed on the donor the gift tax liability. The effective distribution of the property to the donees required the petitioner to discharge his gift tax liability and to cancel the gift tax lien on the donated property.

The Government seeks to distinguish this case from the *Bingham* decision by relying upon the fact that the taxpayer there had a fiduciary obligation to make the distribution, whereas Mr. Cobb had no obligation to make the gifts. Significantly, the Court of Appeals based its decision upon this ground. A casual examination of fundamentals reveals the fallacy of this argument. Section 23(a)(2) begins: "In the case of an *individual* . . ." It is only by provisions of another section of the Code that this section is made to apply also to trustees. The whole amendment to this section was designed primarily for individuals, to allow them deductions for the expenses of actions which they had no duty to take. As a holder of many securities Mr.

Cobb has no duty to seek the advice of investment counsel, but if he does so his expenses are deductible. The fact that he has freedom of choice in the matter has no relevance whatever. Had the trustee in the *Bingham* case been given discretion concerning the time of distribution and the beneficiaries to whom distribution should be made, it is inconceivable that this Court would have disallowed the claimed deduction on that ground.

As the Government has chosen to argue the merits of the decision below, several brief comments appear in order at this time. The Government has labeled the gifts as "profitless separation from the taxpayer of some of his property." We point out that the Tax Court found that one reason Mr. Cobb made the gifts was to save income taxes. (R. 26) As would be pointed out in detail in argument on the merits, Mr. Cobb's method was to give capital which would produce $5,000.00 per year for each daughter, rather than to give $5,000.0 of his income to each daughter each year after paying his income tax on it. His method left him $27,000.00 annual income, whereas the other method would have left him $2,000.00 annual income. Obviously, he was managing and conserving his property when he made the gifts as well as subsequently when he contested the asserted deficiency.

The Government also asserts, "Taxpayer cannot resist liens on donated property and then seek to attribute the cost of resistance to retained property." This is, of course, a *non sequitur*. The Government itself has stated the facts, (Respondent's Brief, 4): "If the taxpayer had been required to pay the original deficiency claimed, it would have been necessary for him to sell additional income-producing securities." Obviously, the same resistance by taxpayer which removed the liens on the donated property also protected the retained property. One of the grounds of the decision of the Tax Court in the *Bingham* case (2 T. C. 853, 859), and the ground of the dissenting Tax Court judges

in the instant case is that expenses incurred in the protection of one's property from lien are deductible under 23(a)(2). We submit that it is a proper ground.

Conclusion.

It is, therefore, submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel.

September 30, 1949.

APPENDIX.

JOSEPH T. LYKES v. U. S.

(U. S. District Court, Southern District of Florida, Tampa Division, Civil No. 1556-T, June 3, 1949, 84 F. Supp. 537)

Chester Ferguson and Macfarlane, Ferguson, Allison & Kelly, Tampa, Fla., for plaintiff.

Herbert S. Phillips, United States Attorney, Tampa, Fla., for defendant.

De Vane, District Judge:

This is a suit to recover an alleged overpayment of income taxes for the year, 1944. The question presented is whether, under Section 23(a) (2) of the Internal Revenue Code, 26 U. S. C. A. § 23(a) (2), attorney's fees paid by the taxpayer in the year 1944 in the determination of his gift tax liability for the year 1940 are allowable as a deduction from his gross income. The evidence in the case is not in dispute.

Plaintiff is and has been for many years a stockholder in Lykes Brothers, Inc., a family corporation. The stock of the corporation has been closely held throughout its existence and there is not nor has there ever been an open market price for the stock. In the year 1940 plaintiff made gifts of 1000 shares of stock of the corporation, owned by him, to members of his family, as follows:

250 shares to Margaret K. Lykes, his wife
250 shares to Margaret H. Lykes, his daughter
250 shares to Elizabeth L. Lykes, his daughter
250 shares to Joseph T. Lykes, Jr., his son.

It appears from the testimony that one of the daughters had reached her majority at the time of the gifts, but the other two children were minors. All of the children made their home with the taxpayer, were unmarried and neither the wife nor the children took any part in the management of the business of Lykes Brothers, Inc., at the time of the gifts.

The motive for the gifts, as stated in the taxpayer's gift tax return, was love. The taxpayer testified to additional motives, the principal of which was the accepted custom or policy of himself and his brothers to make such gifts to

their children to insure continuity of the ownership and management of the company. The evidence shows this custom had been pursued by other members of the Lykes family, who were blessed with children.

At the time the gift tax return was filed taxpayer valued the stock at $120.00 per share and paid a gift tax thereon in the sum of $13,032.75. The taxpayer testified he took as a guide in determining the value of the stock the only arm's-length transaction of importance during that year, of which he had knowledge, which was the sale of several hundred shares by an executive (not a member of the Lykes family) to other executives of the company. He testified he also took into consideration the hazards then confronting the business and reached the conclusion that the market value established by the sale represented the fair value of the stock at the time.

On March 3, 1944 the Commissioner of Internal Revenue formally notified taxpayer that a determination of his gift tax liability for 1940 disclosed a deficiency of $145,276.50 and a deficiency in that amount was assessed against taxpayer. He also was notified of his right to petition the tax court for a re-determination of such deficiency liability.

Taxpayer engaged K. I. McKay to represent him in this matter and a Petition for Re-determination of the liability was filed with the tax court. After taxpayer's attorney had prepared and filed such Petition and prepared his case for trial, a compromise settlement was reached and the Tax Court, pursuant to stipulation of the parties, found a deficiency in taxpayer's gift tax return in the sum of $15,612.75, which was promptly paid. The taxpayer paid his attorney $7,263.83 in the year 1944 for services in this matter. No question is raised as to the reasonableness of the amount paid for the services rendered. If the payment is a deductible expense from gross income for the year, as taxpayer claims, he is entitled to recover $5,665.78 with interest in this case.

The taxpayer claims that the payment of $7,263.83 as attorney's fees was an allowable deduction under Section 23(a) (2) of the Internal Revenue Code in as much as the payment was an "ordinary and necessary expenses paid or incurred during the taxable year * * * for the management, conservation or maintenance of property held for the production of income." He contends the payment was

made, not as the result of an ordinary contest concerning the valuation of ordinary personal gifts, but that it was a payment of legal expenses incurred to forestall the collection by the Government of an assessment of a tax which was so clearly arbitrary and capricious that, in fact, it had nothing to do with the gift on which it was based. He contends further that had it been successfully enforced against him it would have substantially destroyed his holdings in Lykes Brothers, Inc., and would have confiscated most of the property held by him for the production of income.

The Commissioner contends that the law of the case is clearly stated in Treasury Regulation 111, Section 29.23-(a)15(b) as amended by TD 5513. This Regulation provides that expenses paid or incurred by an individual in the determination of gift tax liability, with certain exceptions not applicable here, are not deductible from gross income, even though property held by taxpayer for the production of income must be sold to satisfy an assessment for such tax liability. It is well established that such Treasury Regulations have the force and effect of law if not in conflict with expressed statutory provisions. *Maryland Casualty Company* v. *U. S.*, 251 U. S. 342, 40 S. Ct. 155 [3 AFTR 3010], 64 L. Ed. 297; *United States* v. *Grimaud*, 220 U. S. 506, 31 S. Ct. 480, 55 L. Ed. 563.

Section 23(a) (2) of the Internal Revenue Code, relied upon by taxpayer, provides:

> "Deductions from gross income. In computing net income there shall be allowed as deductions: * * * (2) Non-trade or non-business expenses. In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income."

There is no statute specifically allowing or prohibiting deductions from gross income of attorneys' fees for services rendered in relation to advice or litigation in respect of any Internal Revenue taxes.

Treasury Regulation 111, Section 29.23-(a)-15(b), as amended by T. D. 5513, relied upon by Commissioner, provides:

"Expenses paid or incurred by an individual in the determination of liability for taxes upon his income are deductible. If property is held by an individual for the production of income, amounts expended in determining a property tax imposed with respect to such property during the period when so held are deductible. Expenses paid or incurred by an individual in determining or contesting any liability asserted against him do not become deductible, however, by reason of the fact that property held by him for the production of income may be required to be used or sold for the purpose of satisfying such liability. Thus, expenses paid or incurred by an individual in the determination of gift tax liability, except to the extent that such expenses are allocable to interest on a refund of gift taxes, are not deductible, even though property held by him for the production of income must be sold to satisfy an assessment for such tax liability or even though, in the event of a claim for refund, the amount received will be held by him for the production of income."

The only Appellate Court decision bearing upon the precise question here presented is *Cobb* v. *Commissioner of Internal Revenue*, decided by the U. S. Court of Appeals, Sixth Circuit, 173 F. 2d 711. That court held that under the stipulated and undisputed facts in that case the attorney's fees there paid were not deductible. That case came to the Court of Appeals from a decision of the Tax Court, 10 T. C. 380, which had also disallowed the deduction. The taxpayer in that case, as does the taxpayer here, relied upon *Bingham et al.* v. *Commissioner of Internal Revenue*, 325 U. S. 365, 65 S. Ct. 1232 [33 AFTR 842], 89 L. Ed. 1670, 163 A. L. R. 1175, as supporting his position for the deduction. In the Cobb case the Court of Appeals held that the Bingham case was not controlling and went to considerable pains to point out its reasons for so holding. This court has carefully reviewed these reasons, but finds itself unable to follow them.

This case presents the question, in relationship of the sovereign with its subjects, as to whether Congress has dealt justly with the taxpayer. Congress has imposed gift taxes and has authorized the Commissioner of Internal Revenue to assess an additional gift tax when, in his opin-

ion, there is a deficiency in the gift tax paid by the taxpayer. The Commissioner may do this without giving the taxpayer an opportunity to be heard and the deficiency tax so imposed becomes final upon the taxpayer unless the procedure prescribed by the law is followed, as was done in this case.

To construe the law as giving to the Commissioner the power to assess a taxpayer with a deficiency tax greatly in excess of what he owes and to hold that such law denies to the taxpayer the right to contest such assessment except at his own personal expense, just isn't justice under the law. The statute in question gives the Commissioner no such power and the courts should not permit the Commissioner to write such power into the law by a regulation adopted by him.

The inconsistency of this Treasury Regulation is illustrated by the fact that while it denies the right of the taxpayer to deduct expenses paid or incurred in the determination of a gift tax assessment it authorizes the deduction of expenses incurred in litigation to determine whether the expenses paid or incurred in the gift tax assessment are deductible.

In this connection it is noted that in the Bingham case the same position was taken by the Commissioner as is here taken; that is, that a Treasury Regulation prohibited the deduction.

The Supreme Court in the Bingham case, said [325 U. S. 365, 65 S. Ct. 1238]:

> "So far as this regulation purports to deny deductions of litigation expenses unless it is to produce income, it is not in conformity with the statute • • • ."

This court has reached the opinion that this is also true in this case and the court finds and holds that the Treasury Regulation is in conflict with the expressed statutory provision authorizing the deduction.

A judgment will be entered in favor of the taxpayer, in conformity with this Memorandum Decision.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 261.

FRANK M. COBB, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

PETITION FOR REHEARING.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner in the above entitled case herewith presents his Petition for a Rehearing, and states:

That on October 10, 1949, the Petition for a Writ of Certiorari in this case was denied. The entry further stated "Mr. Justice Black and Mr. Justice Jackson are of the opinion certiorari should be granted."

Petitioner, in support of his Petition for Rehearing herein, states the following grounds:

Subsequent to the filing of the Petition for a Writ of Certiorari herein on August 15, 1949, Petitioner learned that on June 3, 1949, the identical question involved in this case, to wit, whether attorney fees paid by a taxpayer in contesting a gift tax deficiency are deductible for income tax purposes, was decided by the District Court for the Southern District of Florida, in *Lykes* v. *United States*, 84 F. Supp. 537. That court held that the attorney fees paid by the taxpayer were deductible. In commenting upon the decision of the Court of Appeals for the Sixth Circuit in the case at bar, that court said:

> " . . . The taxpayer in that case, as does the taxpayer here, relied upon *Bingham et al.* v. *Commissioner of Internal Revenue*, 325 U. S. 365, as supporting his position for the deduction. In the Cobb case the Court of Appeals held that the Bingham case was not controlling and went to considerable pains to point out its reasons for so holding. This court has carefully reviewed these reasons, but finds itself unable to follow them." (Opinion of Court. See Appendix to Reply Brief, in case at bar, p. 10.)

In September, 1949, the Brief for the Respondent in Opposition was filed, and on September 30, 1949, Petitioner herein filed his Reply Brief, including in the Appendix a full copy of the opinion of said District Court in the *Lykes* case.

Rule 38 of the Rules of this Court provides in subparagraph (4) that upon the expiration of the period for filing the Respondent's Brief, etc.:

> "... the petition, record and briefs shall be distributed by the Clerk to the Court for its consideration.
>
> "(a) Timely reply briefs will be considered, but distribution under this rule shall not be delayed pending the filing of such briefs."

Petitioner urges as a ground for rehearing herein that in view of the requirements of said Rule of Court and the short period between the filing of the Reply Brief on September 30, 1949 and the decision of this Court on October 10, 1949, there was not available to this Court time to receive and consider said Reply Brief. It is improbable that Mr. Justice Douglas during this period of time was able to give consideration to this matter. Mr. Justice Minton did not become a member of this Court until October 12, 1949.

The Court of Appeals for the Fifth Circuit has not yet passed on the *Lykes* case, which was decided June 3, 1949. If the District Court is affirmed, then a conflict of decisions *on the precise question* in the Fifth and Sixth Circuits would exist. To defeat this possibility, the Government may not appeal or may dismiss its appeal. The Government may decide to pay the sum of $5,665.78 with interest, being the judgment of the District Court in the *Lykes* case, and enforce the Treasury Regulation (111, Sec. 29.23-(a)-15(b), as amended by TD 5513) for an *indefinite* period. The monetary advantage to the United States Treasury in pursuing this course of action is obvious.

We submit that grounds for certiorari exist upon the situation as it now stands. It is not known at this time whether the Government will prosecute an appeal in the *Lykes* case. Unless this Court grants certiorari in the case at bar, the Government may settle or dismiss the appeal in the *Lykes* case in order to avoid a conflicting decision by the Court of Appeals for the Fifth Circuit.

Petitioner in his Petition filed herein August 15, 1949 urged that the decision of the Court of Appeals in the case at bar was in conflict in principle with the authoritative interpretation of Sec. 23(a)(2) by this Court in the *Bingham* case. After the decision of the *Bingham* case in 1945, the Treasury Regulations were amended in conformity therewith with respect to the deductibility of attorney fees incurred by a trustee under a testamentary trust. However,

such amended regulations specifically denied such deductibility in the case of a donor in connection with an *inter vivos* gift.

If such Treasury Regulations are invalid as being in conflict with the statute, is there any valid reason for permitting the Government to enforce the same *indefinitely* against all taxpayers until at some future date a conflict of decisions may arise in different Courts of Appeal?

For the foregoing reasons, it is respectfully urged that this Petition for a Rehearing be granted.

Respectfully submitted,

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Of Counsel.

October 24, 1949.

CERTIFICATE OF COUNSEL.

I, Robert Ash, counsel for the above named Petitioner, do hereby certify that the foregoing Petition for Rehearing in this cause is presented in good faith and not for delay, and that the foregoing grounds are confined to intervening circumstances of substantial or controlling effect.

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